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JAMES H. McKENNEY,

Synopsis of Brf. of Carter v Lehigh for Appellees.

Supreme Court of the United States.

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UNITED STATES,
Appellant,

vs.

THE JOINT TRAFFIC ASSOCIATION,
et al.

Synopsis of the Brief for the Joint Traffic Association.

The brief prepared by the undersigned for the Joint Traffic Association was designed to be a full argument on the main questions involved. The considerations having a just place in such an argument are so numerous that they could not be thus dealt with without much copiousness of treatment, and this has necessarily protracted the argument to a great length. It has been the endeavor to preserve a just sequence throughout.

It may be convenient for the Court to be informed beforehand by a synopsis what the line of argument is, and what the principal matters are which go to make it up.

First.—The Preliminary Statement: This is mainly designed to set forth what the true question in controversy is, and point out that it was neither raised nor

considered, and consequently was not determined by the recent decision in the case of the United States against the Trans-Missouri Association. That decision took the question to be, whether, assuming that the agreement under discussion in that case did contain a restraint upon trade and commerce, it could be relieved from condemnation under the Anti-Trust Law, by showing that the restraint was a *reasonable* one, whereas the question now made and discussed in this brief, so far as that act is concerned, is whether such agreements as that of the Joint Traffic Association are, in fact, in any sense restraints of trade or commerce.

Second.—The First and Second Points are made upon questions of procedure, and the matter under them is so brief that no preliminary explanation is needed.

Third.—The argument of the main question, whether the agreement is condemned by the Anti-Trust Act, is begun with the Third Point, which is designed simply to show how the *class of contracts* condemned by the act is *defined*. This is necessarily the first step towards ascertaining whether the contract in question falls within the class. This point goes no further than to assert that the class of contracts condemned is defined by a reference to the *actual effect* which they have upon trade or commerce; that is to say, that only such contracts are condemned as have the actual effect of *restraining* trade or commerce.

Fourth.—The Fourth Point deals only, and very briefly, with the meaning of the word *restrain*, pointing out that its invariable meaning when used in the phrase "restraint of trade" is to *diminish*, and therefore to *injure* trade.

Fifth.—The class of contracts which is condemned

by the act, and the meaning of the words which define the class having thus been pointed out, the way is open for a statement of the main general proposition, and this is made by the Fifth Point, and is that the agreement under which the Joint Traffic Association was formed is *not* a contract in restraint of trade or commerce within the meaning of the act of July 2d, 1890.

The bulk of the whole discussion, so far as respects the Anti-Trust Act, is contained under this Fifth Point, and the line of argument pursued is substantially as follows:

(1.) That no restraint is *directly*, or *in terms*, imposed upon trade or commerce; that all the members of the Association will, as the agreement assumes, continue in business, doing the utmost they can, and in competition with each other; that whatever restraint is imposed by it is imposed simply upon a *single feature* of this competition; that, competition and trade not being identical with each other, a restraint upon competition is not *necessarily* a restraint upon trade.

It is admitted, however, that a restraint upon competition *may be* a restraint upon trade; but it is asserted that whether it is so or not, in any particular case, depends upon the nature and effect of the restraint imposed in such case.

(2.) The argument thus reaches one of the main subjects of discussion, namely, what the effects of competition in trade are; when they are good, and when, if ever, they are bad; and how such restraints have been regarded in public economy, law and legislation. This subject is treated at first *generally*, without reference to the particular effects of competition in the business of *railroad transportation*.

(3.) It is then pointed out (page 54) that the particular field of discussion in the case has been, by what precedes, fully disclosed, namely, the effects of restraints upon *competition* as restraining, or not restraining, trade and commerce, and a particular proposition, substantially equivalent to the main one, is stated as follows:

" III. The agreement in question, as a whole, " and, particularly, so much of it as effects com- " petition, is in the highest degree *promotive* of trade and commerce" (page 35).

The discussion on this head pursues the following course:

(*a*) It begins with a statement of " the ori- " gin, development and present condition in " this country of the business of railway trans- " portation," and shows that by the deliberate policy of all our governments, State and National, that business has been, from the first, subjected to the severest *involuntary* competition, and it points out the ruinous results to which such competition leads when it takes place on *rates*, and aims to show that such results can be arrested, or mitigated, only by allowing the competing parties to displace the strife by some form of agreement.

(*b*) This discussion is proceeded with by pointing out what the main requisites of a good railway service are, and how they are affected by railway competition *in rates*. It aims to show that such competition, by making *uniformity in rates* impossible, makes it impossible to secure any of these essential requisites, and that they can be secured only by some form of concerted agreement between the parties.

(4.) The subject of agreements between railway companies and co-operative traffic associations being thus reached, a sketch is made of their origin and development down to the time of the passage of the Interstate Commerce Law, and it is shown that the most efficacious form of agreement down to that time had been found to be that of *pooling*.

(5.) The Interstate Commerce Law and its effects are then discussed, and it is shown that one of its main objects was to bring about, so far as Federal legislation could accomplish it, *uniformity in rates*, and thus put an end to the practice of discrimination, and attention is called to the incidental feature of the law which prohibited pooling agreements. It is then shown that the effect of that law was to increase and aggravate the very evils which it was designed to remove. Pooling being prohibited, the most effective method for securing uniformity in rates could no longer be employed, and ruinous competition, with every form of discrimination, followed, and to these evils was added the unendurable aggravation that the practices which the law could not prevent were, nevertheless, converted into crimes.

(6.) It is then shown that the necessity was universally felt for some form of concerted action which would put an end to these deplorable conditions and that the present agreement was the result of an earnest effort in this direction.

(7.) An analysis of the agreement is then made, and it is pointed out that it is not aimed against competition *in general*, but assumes that such competition will still continue actively and earnestly on every point except that of *rates*.

Its precise effect upon competition in *rates* is dealt with, and it is shown that while its object is to secure uniformity in rates by inducing competing companies to consent to such uniformity, it does not purport to require it or compel it. That it does not really, or in any proper sense, seek to restrain competition at all, but aims to render competition *open*, *honest* and *lawful*, so that the business of railway transportation may be conducted in conformity with the requirements of the Interstate Commerce Law, and without the daily commission of crime. It shows that, to this end, it is necessary that each railroad company should first establish its rates and should adhere to them for a reasonable period, which is fixed at thirty days, in order if it intends a change that it may give reasonable notice of its intention in time to enable the competing parties to meet it, and to shape their own conduct accordingly; that this is absolutely the only restraint upon competition effected by the agreement, and being only slight and temporary, and necessary in order to enable competition to be open and lawful, cannot be regarded as a restraint upon trade.

It admits that one of its main objects is to secure what the Interstate Commerce Law sought to secure, uniformity in *rates*, but its method of effecting that result is, not by a compulsory agreement, but by taking away the motives to ruinous, secret and unlawful competition in rates. It also points out the many other beneficial provisions of the agreement by which it is sought to make the railroad transportation of the country regular, orderly, safe and effective.

(8). It further seeks to emphasize the beneficial purposes of the agreement by showing that every great industry in which the co-operation of many

different proprietors and agencies is required, necessarily calls for a system of regulation which must be supplied either by the action of government, or, in the absence of such action, by the voluntary action of those who are engaged in it, and it pronounces the association as "*an institu-* "*tion for the regulation of transportation business* "*in those respects in which the State, either from* "*lack of jurisdiction, or because it deems that the* "*regulation could be best devised and administered* "*by the railroad systems themselves, has chosen* "*not to regulate it.*"

(9). Throughout this part of the argument the central proposition is that of the absolute necessity for *some* agency by which *uniformity in rates* may be brought about, and a uniformity not only in the case of merchandise shipped from the same point to the same terminus, but also in the case of merchandise shipped from, or to, any points in any way competing. So long as competition in *rates* exists different men and different places will necessarily be put up, or pulled down, enriched or ruined, as one railroad company may think it to be for its interest to make lower rates than another, and without regard to comparative skill, industry, or other natural advantages which furnish the true and only field for useful competition.

Railway transportation is a public function, and absolute *neutrality* in relation to the multitudinous competitions of life is an essential condition of its just discharge. This neutrality can be secured only by uniformity *in rates*. If this is not secured by government it must be brought about by some private agency. It cannot be secured by governmental action, because the government has committed the business to private hands. The Interstate Commerce Law had this

uniformity for its prime object; and went to the limit of Congressional power in the effort to accomplish it. The prime object of the present agreement is to supplement the effort, not by compulsorily restricting competition, but by taking away the *motives* to it.

It is asked whether it is possible to regard an organization formed to effect an object which the law and public policy unite in viewing as essential, but which Congress cannot by law reach, as a restraint upon trade? It is believed that when this single subject is considered in all its various relations, it is, of itself alone, decisive of the whole controversy.

(10.) The important matter of the classification of freight is taken up and considered, and it is shown that the great end of uniformity in rates cannot be attained without a system of classification; that classification is only a part, although a necessary part, of *rate making;* that its only object and purpose is to make uniformity in rates possible; that it has never been attempted, except as part of an effort to bring about such uniformity, and can never be perfected, or even preserved, except upon the condition of such uniformity.

(11.) The *general usefulness* of the organization formed by the Association is dwelt upon by calling attention to the multitude and variety of subjects upon which it is daily engaged, and especially to its constant occupation with the question, how any particular rates which may happen to have been established, or which may be proposed to be established, affect different places and different merchants or manufacturers engaged in the same business, and who are in competition

with each other, whether they may be a few miles or hundreds of miles apart. It is asserted that the Association becomes the practical arbitrator in cases where the Interstate Commerce Law cannot operate between competing merchants and manufacturers, and between competing places, as to what rates even-handed justice to all requires; that from the nature of the case and the interest of the railroads themselves, no rules can be adopted for decision of such questions except those of justice and equality, and that it is practically impossible that it should be made a medium of monopoly, or for the exaction of anything more than reasonable charges; and that this is proved by a reference to the course of railroad charges during the whole period, embracing many years, in which such agreements have existed, the fact being that they have continually declined from the rate of about three cents a ton or mile to less than one cent a ton or mile, a rate lower than that of railway transportation in any other quarter of the world.

(12.) The argument then, under general subdivision IV (page 105), refers to the matters of fact which were involved or assumed in the foregoing discussion, and justifies whatever assumptions have been made in the following ways:

(*a.*) That, by the very nature of the case, they are matters which must necessarily be true, because they are the results of the operation of the familiar and well-known laws relating to industrial pursuits.

(*b*) Because they have that *notoriety* which requires a court to take judicial notice of them.

(*c*) Because they are fully established by averements in the answer admitted by the appellant in setting down the cause for hearing upon bill and answer.

(*d*) By the declarations repeated in multiplied forms, of the Interstate Commerce Commission, the great public agency which has such supervision and control over the business of railway transportation as Congress can assert. Copious extracts from these declarations are set forth.

(13.) These extracts and other proofs thus referred to are again declared to stamp this Association as one instance, of which industrial life furnishes a multitude, where industrial interests of great magnitude are subjected to private *regulation*, and for the reason that the State recognizes, and always has recognized, the fact that such regulation is far more effective over a large range of subjects than any which the State itself could devise and enforce. This statement is confirmed and illustrated by reference to many different instances.

(*a*) To the multitudinous associations among workmen and employees of various descriptions, all based upon agreements far more in restraint of competition than any contained in this instrument.

(*b*) Similar unions among the employers of labor.

(*c*) To the numerous Commercial, Stock and Produce Exchanges and Boards of Trade, all

of which prescribe rates of commission and for compensation for various services, and forbid any departure from them, and are far more restrictive of competition than any provision in the agreement in question.

(14.) The question is submitted whether trade is in any way restrained by the agreements between laborers and employees, or those between the employers of labor, and it is answered by saying that the final and general results, notwithstanding occasional abuses, are greatly to increase the efficiency of labor and the amount of work done, and to elevate the character of the laboring classes.

The same question is asked in respect to Commercial Exchanges and Boards of Trade, whether they restrain the business with which they are conducted, whether there is less buying or selling of goods in consequence of commissions or other charges being fixed at particular sums. It is answered by saying that, as every one knows, these are all agencies by which the number and magnitude of business transactions is enormously increased.

The same question is put in relation to the operation of the present agreement, or of any agreement tending to secure uniformity in railroad rates and the stability, certainty and safety of railway transportation ; and it is asked whether, in consequence of such agreements, the business of railway transportation or the exchange of commodities is in any particular diminished, and whether it is not, on the contrary, prodigiously extended and enlarged.

(15.) Under general sub-division V (p. 141), the conclusion to which the foregoing line of

argument leads is drawn in these words: "*That "the agreement which this action seeks to condemn "is not by reason of any restraint effected by it "upon competition, or otherwise, a contract in re- "straint of trade or commerce, but is on the con- "trary highly needful to, and promotive of, both.*"

Its necessity to beneficial purposes, as thus established, is then separately pointed out by way of summing up:

(*a*) Its necessity to *stability in rates*

(*b*) Its necessity to *uniformity in rates* and to prevent *unjust discrimination.*

(*c*) Its necessity to secure the general benefits of harmonious co-operation in *classification* and interchange of traffic.

(*d*) Its necessity as a supplement to the Interstate Commerce Act, and in order to make the objects of that act attainable.

(*e*) Its necessity for the *prevention of crime*, for its *punishment* when committed, and for the *prevention of perjury*, committed in order to conceal crime.

(17.) Before leaving the discussion, its results, which are believed to have been established, are made the basis, under the sixth point (p. 151) of an independent proposition, the truth of which it is believed must be accepted. That proposition is as follows:

If the Anti-Trust Act is interpreted as forbidding agreements, such as the one under discussion, one of three alternatives must necessarily follow:

(1.) That all railroad transportation be abandoned; or

(2.) The consolidation of all competing railroads under a single ownership, either governmental or private; or

(3.) That all competing railroad business must be carried on in constant and daily violation of criminal law.

It is then shown that, inasmuch as neither of the first two of these alternatives is admissible, the third will necessarily follow, and the considerations which make this necessity apparent are again pointed out.

It is then asked with much confidence whether an agreement *necessary* to the prevention of daily violations of criminal law can be regarded as in restraint of trade.

(18.) Under this head an authoritative and very recent decision of this Court is invoked, that of Trinity Church against the United States (143 U. S., 457). The Court in that case declared that if in the interpretation of criminal law a certain act is, by the letter of the law, included within a *class* made criminal, and it yet satisfactorily appears that Congress could not have intended to make such an act criminal, it would be held to be not included within the condemnation; and the decision was fortified by a conclusive array of authorities. It is pointed out that the respondents in this case do not call upon the Court to take such, or indeed any, liberty whatever with the *letter* of any law. In the case referred to the question was not what acts were declared to be crimes by the letter of the law, but whether a particular act confessedly

within the class of crimes could be taken out of it. In our case the question is what the letter of the law *includes*. It is then pointed out that the decision of the Court in the Trans-Missouri case employed the same reasoning as in the case before referred to. It assumed, or regarded it as conceded, that the agreement there in question fell, by the letter of the law, within the condemnation, and the question was whether there was sufficient grounds for taking it out. The Court declared that strong reasons were shown for taking it out, but that they were not strong enough, inasmuch as it appeared that different opinions were entertained as to the policy and propriety of such agreements. The *burden* is *now* on the government to show that our agreement is *within* the letter of the condemnation and that burden cannot be supported by simply showing, if it could be shown, that in the opinion of some persons such agreements are against public policy. It must be shown that the agreement *is within* the letter of the law, which can be done only by showing that its effect upon trade is to restrain, diminish and injure it.

(19.) The seventh point (p. 158) is devoted to a discussion of the *authorities*, and a suggested distinction between agreements restraining competition between persons or corporations engaged in business of a *public* nature and those engaged in *private* business, is fully discussed.

The result reached from this discussion of authorities is that if there could be said to be any authority holding such an agreement as ours to be in restraint of trade, or otherwise injurious to trade or commerce, the overwhelming weight of intelligent authority requires the contrary conclusion.

(20.) The eighth point is a denial that the agreement in any sense constitutes a *monopoly* or a *combination* or a *conspiracy* to *monopolize*.

Under this head it is shown, what must be seen at a glance, that it presents no feature of a monopoly; that no one of the parties to the agreement covenants not to do business, or to restrict its business; but, on the contrary, that the agreement assumes that every party will continue to strive its utmost to obtain all the business it can. The agreement diminishes in no particular the motives to activity of any party or lessens the interest of any party in acquiring business.

Nor does it in any manner, directly or indirectly, seek to prevent or have any effect in preventing other parties from engaging in the same business.

Sixth.—The ninth and last point (p. 190) is devoted to a denial that the agreement is in any manner or sense violative of the prohibition by the Interstate Commerce Act of pooling agreements.

The line of argument upon this point is so simple and direct as to require no synopsis.

JAMES C. CARTER,
LEWIS CASS LEDYARD,
Of Counsel for the Joint Traffic Association.